No. 18-389

In the Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FREEPORT-MCMORAN OIL & GAS LLC, AMPLIFY ENERGY CORP., BETA OPERATING COMPANY, LLC, DCOR, LLC, ENSIGN UNITED STATES DRILLING (CALIFORNIA), INC., ARDENT COMPANIES, INC., AMERICAN PETROLEUM INSTITUTE, CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL OCEAN INDUSTRIES ASSOCIATION, OFFSHORE OPERATORS COMMITTEE, and WESTERN STATES PETROLEUM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are companies with oil and gas operations on the Outer Continental Shelf ("OCS") or in the offshore industry, and trade associations whose members operate in, serve, or have other interests in that industry. *Amici curiae* Freeport-McMoRan Oil & Gas LLC, Amplify Energy Corp. (partly through its subsidiary Beta Operating Company, LLC), Ardent Companies, Inc., DCOR, LLC, and Ensign United States Drilling (California), Inc., are companies engaged in the acquisition, exploration, development, and production of oil and gas properties on the OCS, and which employ individuals to work on offshore OCS platforms off the California coast and in the Gulf of Mexico. Several *amici* are defendants in pending litigation in which OCS platform workers assert wage-and-hour claims under California law. Because those cases will likely be affected by the disposition of this case, those *amici* have a direct and substantial interest in this case.

Amici the American Petroleum Institute, California Independent Petroleum Association, Independent Petroleum Association of America, National Association of Manufacturers, National Ocean Industries Association, Offshore Operators Committee, and Western States Petroleum Association are trade associations representing business interests

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. The parties were given timely notice and have consented to this filing.

involved or supporting the offshore industry, including crude oil and natural gas producers and oil and natural gas exploration and production companies with operations on the OCS.

Collectively, *amici* participate regularly in legislative, regulatory, and judicial proceedings that may affect their or their members' interests. *Amici* have an interest in ensuring a stable and predictable legal framework governing the offshore industry, to allow businesses and employees to know which labor and employment practices (among other laws) apply to U.S. offshore operations. All *amici* have a strong and direct interest in the question presented here—*i.e.*, the circumstances in which state wage-and-hour laws might apply to operations on the OCS.

INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioner Parker Drilling Management Services, Ltd. ("Parker") has demonstrated, this Court's review is urgently warranted. The decision below departs from decades of settled law, opens a split among the federal circuits having jurisdiction over virtually *all* oil and gas activity on the OCS, and misconstrues the text, history, and purpose of the Outer Continental Shelf Lands Act ("OCSLA"). Pet. 3-4. *Amici* focus here on four particular reasons why this Court should grant review.

First, in interpreting OCSLA to allow state law to apply on the OCS even in the absence of a "gap" in federal law, the Ninth Circuit expressly rejected a rule that is settled law in the Fifth and Eleventh Circuits. In so doing, it created a square conflict

among the federal courts of appeals with territorial jurisdiction over virtually all U.S. oil and gas operations on the OCS. This conflict undermines predictability and uniformity for those—like several *amici* or their members—with operations in both the Gulf of Mexico and offshore of the West Coast.

Second, by rejecting a legal standard that has provided the choice-of-law framework on the OCS for almost 50 years, the decision disrupted longstanding and mutually beneficial employment relationships carefully tailored to the unique circumstances of living and working offshore. It has replaced them with uncertainty and confusion regarding compensation, benefits and employment relations. And the Ninth Circuit's decision potentially subjects OCS employers to hundreds of millions of dollars in retroactive damages, fines, and penalties—above and beyond the already generous wages and benefits employees have enjoyed under existing arrangements.

Third, the Ninth Circuit's decision effectively accords state law supremacy over federal law in an area under exclusive federal jurisdiction and control, contrary to Congress's intent and this Court's longstanding precedent. This case asks whether California state law requiring employees to be paid for non-working (and even sleeping) hours displaces federal regulations long providing the opposite. But if the decision below stands, it will give rise to a host of other conflicts and business uncertainties. For instance, federal law currently instructs an employer to pay overtime wages only if an employee works more than 40 hours in a week, while California law

requires overtime to be paid for every hour above 8 worked in a single day.

Finally, given the reality that some states will have different—and even diametrically opposed—policy preferences than the federal government regarding OCS activity, this decision invites strategic behavior. It allows states to promulgate laws intended to increase the difficulty and cost of OCS operations that the federal government seeks to encourage. That result is particularly intolerable, given Congress's choice to make the OCS an area within exclusive federal jurisdiction, subject exclusively to federal law.

ARGUMENT

When businesses decide whether and how to invest and operate on the OCS, a key threshold question is whether federal or state law applies. The Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*, defines the body of law applicable to the OCS and the structures there, including drilling and production platforms. See *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969).

By enacting OCSLA, which extended the jurisdiction of the United States and its laws to the OCS, "Congress * * * affirm[ed] the Federal Government's authority and control over the [OCS]." *Pac. Operators Offshore, LLP* v. *Valladolid*, 565 U.S. 207, 212 (2012) (citing 43 U.S.C. §§1331(a), 1332(1)); see also *United States* v. *Maine*, 420 U.S. 515, 522 (1975) (discussing pre-OCSLA cases holding that the "control and disposition" of the OCS was "in the first instance * * * the business of the Federal Government

rather than the States"). The OCS, and the platforms attached to it, are "subject to the exclusive jurisdiction and control of the Federal Government." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 27 (1988); accord *Rodrigue*, 395 U.S. at 355-357 ("[i]t is evident * * * that federal law is 'exclusive' in its regulation of" the OCS and the structures fixed thereon).

Recognizing that federal law might not address the full range of legal issues potentially arising on the OCS, Congress included a choice-of-law provision that this Court and every other court to consider the question until now have understood to "supplement[] gaps in the federal law with state law." *Rodrigue*, 395 U.S. at 357 (citing 43 U.S.C. §1333(a)(2)(A)). Under this provision, "[a]ll law applicable to the [OCS] is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 480-481 (1981) (citations omitted); see also Pet. 33-34 ("state law *never* applies of its own force under OCSLA," because adopted state law becomes "'the law of the United States'" (quoting *Rodrigue*, 395 U.S. at 355-356)).

Contrary to long-settled precedent and widely held expectations of employers and employees alike, the Ninth Circuit held here that workers employed on OCS platforms may bring claims under state wage-and-hour laws. Pet. App. 1-2. The Ninth Circuit expressly "reject[ed] the proposition"—first es-

tablished in the Fifth Circuit and since accepted nationwide—that state law applies on the OCS *only* if "necess[ary] to fill a significant void or gap" in federal law. Pet. App. 2 (citing *Cont'l Oil Co.* v. *London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969)).

The Ninth Circuit's decision is already having—and if allowed to stand, will continue to have—far-reaching practical and financial consequences not only for OCS employers, but also for thousands of employees working offshore pursuant to generous contractual and other arrangements predicated on a legal framework the panel discarded. Under the decision below, the terms of those employment arrangements very likely will no longer be sustainable or mutually beneficial.

I. The Ninth Circuit's Decision Rejects Decades Of Settled Law

Half a century ago, the Fifth Circuit articulated a clear and easily implemented standard for when state law applies as surrogate federal law under §1333(a)(2)(A). That standard comports with OCSLA's text and purpose, this Court's precedent, longstanding industry practice, employee expectations, and common sense. The Ninth Circuit, however, explicitly rejected that settled understanding, creating a square circuit split and introducing destabilizing uncertainty into OCSLA's governing legal framework.

As even the Ninth Circuit acknowledged, see Pet. App. 11-14, any understanding of OCSLA must begin with *Rodrigue* v. *Aetna Casualty & Surety Co.*,

395 U.S. 352 (1969). After exhaustively considering the statutory text, history, and purpose, *Rodrigue* concluded that OCSLA "makes it clear that federal law, supplemented by state law of the adjacent State, is to be applied to * * * artificial islands [affixed on the OCS] as though they were federal enclaves in an upland State." *Id.* at 355.

Turning first to the statutory text, this Court found it "evident * * * that federal law is 'exclusive' in its regulation of [the OCS]," and that state law is adopted as surrogate federal law only when necessary to "supplement[] gaps in the federal law." *Id.* at 357. The statute's history, this Court concluded, also "makes it clear that state law could be used to fill federal voids" but that ultimately "federal law should prevail." See *id.* at 357-359. However, "for federal law to oust adopted state law[,] federal law must first apply." *Id.* at 359. On the facts of that case, this Court concluded that federal law did not apply, see *id.* at 359-366, thus "remov[ing] any obstacle to the application of state law," see *id.* at 355, 366. In other words, because federal law did not apply *at all*, "a substantial 'gap' in federal law" existed, to be "filled with the applicable body of state law." See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 101 (1971) (discussing *Rodrigue*, 395 U.S. 352); see also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 217-218 (1986) (explaining that in *Rodrigue*, federal law did not apply, and thus did not "preclude the application of state law as adopted federal law through OCSLA").

Shortly after *Rodrigue*, the Fifth Circuit addressed whether state law is "applicable and not inconsistent" under §1333(a)(2)(A) when existing federal law *does* provide a comprehensive governing scheme. Applying "the recurring theme of *Rodrigue*," the Fifth Circuit concluded that "the deliberate choice of federal law, federally administered, requires that 'applicable' [in §1333(a)(2)(A)] be read in terms of necessity—necessity to fill a significant void or gap" in federal law. *Cont'l Oil*, 417 F.2d at 1036. Otherwise put, when federal law provides both a right and a remedy, the application of state law is neither "needed [n]or permitted" under OCSLA. *Id.* at 1035-1036; see also *Nations* v. *Morris*, 483 F.2d 577, 590 (5th Cir. 1973) (when a comprehensive federal statutory scheme applies on the OCS, "[t]here is no need to bring aboard" state law "to cause liability to be fixed where Congress never intended it").

Since 1969, the Fifth Circuit has consistently held that "OCSLA adopts the law of the adjacent state * * * as surrogate federal law" only "[w]hen there are 'gaps in the federal law[.]'" *Tetra Techs., Inc.* v. *Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016) (quoting *Rodrigue*, 395 U.S. at 357); see also, *e.g.*, *Texaco Expl. & Prod., Inc.* v. *AmClyde Engineered Prods. Co.*, 448 F.3d 760, 772 (5th Cir. 2006) ("OCSLA extends federal law to the [OCS] and borrows adjacent state law as a gap-filler."). This Court also similarly reaffirmed *Rodrigue*'s central premise—namely, that the laws of the adjacent States apply under OCSLA only when necessary "to fill the substantial 'gaps' in the coverage of federal law." *Gulf Offshore*, 453 U.S. at 480-481; see also, *e.g.*,

Maryland v. *Louisiana*, 451 U.S. 725, 752 n.26 (1981); *Huson*, 404 U.S. at 103-105. *Continental Oil* itself is sufficiently longstanding that it also serves as binding precedent in the Eleventh Circuit. See Pet. 11-12, 18; see also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). And the decision had been consistently followed by district courts in the Ninth Circuit.[2] In other words, until this case, the *Continental Oil* standard governed virtually all offshore oil and gas operations on the OCS.

Despite the panel's suggestion that the Fifth Circuit has departed from this settled framework, *Continental Oil* remains good law today. See Pet. 18-20. Notably, the very case the Ninth Circuit cited as creating uncertainty, *Union Texas Petroleum Corp.* v. *PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990), acknowledged the central holding of both *Rodrigue* and *Continental Oil*, emphasizing that Congress intended for "the OCS [to] be treated as an area of exclusive federal jurisdiction * * * where state law will apply *to fill in the gaps in the federal law*."[3] *Id.* at 1052 (emphasis added). *PLT* did not

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[2] See, *e.g.*, *Garcia* v. *Freeport-McMoRan Oil & Gas LLC*, No. 16-cv-4320 (C.D. Cal. Sept. 16, 2016); *Jefferson* v. *Beta Operating Co.*, No. 15-cv-4966 (C.D. Cal. Nov. 3, 2015); *Espinoza* v. *Beta Operating Co.*, No. 15-cv-4659 (C.D. Cal. Oct. 29, 2015); *Reyna* v. *Venoco, Inc.*, No. 15-cv-4525 (C.D. Cal. Oct. 23, 2015); *Williams* v. *Brinderson Constructors, Inc.*, No. 15-cv-2474, 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015).

[3] Even if *PLT* had purported to overrule *Continental Oil*, which the opinion gave no hint of doing, see Pet. 18, *Continental Oil* would still control. See *Texaco Inc.* v. *Louisiana Land & Expl. Co.*, 995 F.2d 43, 44 (5th Cir. 1993) ("[i]n the event of

focus on whether a gap existed in federal law because—unlike in this case, in which the Fair Labor Standards Act ("FLSA") provides a comprehensive scheme, see Pet. 8-9, 30-32—there was no federal law to apply. See *PLT*, 895 F.2d at 1047 ("*Rodrigue* made clear that 'for federal law to oust adopted state law, federal law must first apply'" (quoting *Rodrigue*, 395 U.S. at 359)). Moreover, as even the panel below ultimately acknowledged, *Continental Oil* and *PLT* can be reconciled in a way that preserves the full force of the *Continental Oil* rule, "such that the *PLT* conditions come into play only if there is a significant gap or void in federal law." Pet. App. 19 (citing *Tetra Techs.*, 814 F.3d at 738). The direct conflict between the Fifth and Eleventh Circuits, on one hand, and the Ninth Circuit's decision, on the other, strongly supports this Court's review.

Several features of OCS oil and gas operations and OCSLA litigation exacerbate the practical consequences of the circuit split. The Fifth, Eleventh, and Ninth Circuits collectively have jurisdiction over virtually all existing operations on the OCS in the United States—*i.e.*, the Pacific Coast (including Alaska) and the Gulf Coast. The vast majority of America's coastal waters currently open to offshore oil and gas production activity are located off the coasts of States within the territorial jurisdiction of the Fifth and Eleventh Circuits.[4] To the extent drill-

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conflicting panel opinions * * *, the earlier one controls" (citations and internal quotation marks omitted)).

[4] See Bureau of Ocean Energy Mgmt., *Gulf of Mexico OCS Region*, https://www.boem.gov/Gulf-of-Mexico-Region/ (areas

ing occurs elsewhere, it is located almost entirely offshore of States within the Ninth Circuit's jurisdiction.[5] As a result, OCSLA litigation occurs all but exclusively in these circuits. Moreover, for companies with offshore operations in both regions, enterprise-wide policies and employer-employee relationships are subject to Fifth, Eleventh, and Ninth Circuit jurisdiction simultaneously. The Ninth Circuit's decision means that such companies and their employees will face inconsistent choice-of-law analysis—and ultimately inconsistent substantive obligations—depending on where operations are located, undermining uniformity in the implementation of OCSLA.

The Ninth Circuit's decision could significantly disrupt oil and gas operations on the OCS. Employers and employees associated with drilling and production platforms have structured employment relationships in reliance on the long-settled line of cases including *Rodrigue* and *Continental Oil*. If the decision here stands, operations along the Pacific Coast will be governed by different choice-of-law rules than those in the Gulf, undermining expectations and disrupting contractual and other arrangements.

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off the coasts of Texas, Louisiana, Mississippi, and Alabama "generat[e] about 97% of all OCS oil and gas production").

[5] See, *e.g.*, U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., ***2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program*** (Jan. 2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

Even within the Ninth Circuit, OCS operations now face different legal rules, depending on their location. Four States within the Ninth Circuit's jurisdiction—California, Oregon, Washington, and Alaska—are adjacent to offshore OCS oil and gas activity.[6] Stark differences exist in their laws. For example, courts of those states have reached diametrically opposing views about compensation for employees who reside on an employer's premises for extended periods of time. Compare *Mendiola* v. *CPS Sec. Solutions, Inc.*, 340 P.3d 355, 362-363 (Cal. 2015) (under state law, on-call hours, including "sleep time," represent "hours worked" for overtime purposes), with *Air Logistics of Alaska, Inc.* v. *Throop*, 181 P.3d 1084, 1092-1094 (Alaska 2008) (sleep and recreation time need not be compensated as overtime work).[7]

To be sure, Congress recognized in OCSLA that in some circumstances, an interest in "national uniformity" would give way to other considerations. Pet. App. 38 (quoting *Gulf Offshore*, 453 U.S. at 487; *Huson*, 404 U.S. at 104); Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New*

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[6] See Bureau of Ocean Energy Mgmt., *Pacific OCS Region*, https://www.boem.gov/Pacific-Region/; Bureau of Ocean Energy Mgmt., *Alaska OCS Region*, https://www.boem.gov/Alaska-Region/.

[7] Federal regulations addressing compensation for employees who reside on their employers' premises "for extended periods of time" provide that employees are "not considered as working all the time [they are] on the premises," and give effect to "any reasonable agreement of the parties" concerning wages for overtime work. 29 C.F.R. §785.23.

Frontier, 6 STAN. L. REV. 23, 40-41 (1953). But Congress assured a minimum degree of uniformity by "incorporati[ng] * * * the law of adjacent States *to fill gaps in federal law*." See *Gulf Offshore*, 453 U.S. at 479 n.7, 486-488 (emphasis added). This Court's review is essential to ensure uniformity and predictability in the choice-of-law framework, in a manner consistent with OCSLA's text and intent.[8]

II. The Ninth Circuit's Decision Disrupts Employment Relationships Formed In Reliance On Settled Law

For decades, employers and employees on OCS drilling and production platforms have implemented compensation and benefit structures under a shared understanding of substantive background law. Whether by arms-length negotiated contracts, collective bargaining, or other arrangements, these policies have been tailored to the offshore industry, recognizing (among other things) that workers often temporarily reside on premises. The terms of these arrangements generally are far more favorable—including with respect to wages, overtime, and other benefits—than those seen in non-OCS industries typically covered by state wage-and-hour laws. By rejecting the legal principles on which these relationships were based, and potentially exposing employers to massive retroactive liability for reasona-

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[8] The possibility of expanded OCS operations under current U.S. policy will only heighten the need for uniformity and consistency in the governing legal framework. See *supra* n.5.

bly relying on longstanding law, the panel undermined the stability of those relationships, with tremendous practical and financial consequences.[9]

Oil and gas operations on the OCS present unique opportunities and challenges. Production platforms affixed to the OCS operate 24 hours a day and are often in remote locations miles from the coast. While some employees may have the option to return home each night, in other instances, it may be impractical or undesirable to commute. For example, employees may prefer not to commute given travel time and logistics. Others may not reside near enough to allow commuting, for instance choosing to live in a less expensive inland area rather than in a California coastal city such as Santa Barbara. As a result, employees often work agreed-upon shifts, or "hitches," in which the employees work, eat, sleep, and live on the platforms for a specified number of days—typically followed by an equal number of days off. See Pet. App. 3 (14-day shifts on the platform with employees scheduled to work 12 hours during a 24-hour period, followed by 14 days at home); see also *Meadows* v. *Latshaw Drilling Co.*, 866 F.3d 307, 309 (5th Cir. 2017).

In recognition of the particular circumstances of work on OCS drilling platforms, employees receive and enjoy above-market salaries, generous benefits,

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[9] The Ninth Circuit reserved for the district court to decide in the first instance "whether [the] holding should be applied retrospectively." Pet. App. 43 (citing *Huson*, 404 U.S. at 106-107).

and abundant time off.[10] Long before the decision at issue here, OCS employees received hourly rates "well above the state and federal minimum wage" and "premium rates for overtime hours." Pet. App. 20. By one recent estimate, offshore oil and gas workers earn more than 150% of the average hourly wage of other employees.[11] Moreover, during the non-working (*e.g.*, sleeping and recreation) hours within a hitch that form the basis for this lawsuit, employees can use their time as they see fit. The platforms are equipped with various amenities for employees to use free of charge, including cable television, internet access, and fitness and recreation facilities, allowing employees to engage cost-free in many of the same personal and leisure activities

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[10] See, *e.g.*, International Association of Drilling Contractors, *Life on a Drilling Rig*, http://drillingmatters.iadc.org/life-on-a-drilling-rig/.

[11] U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program* (Jan. 2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/; see also Jim Nicholson, *The Incredible Economic Opportunities of Offshore Energy Exploration*, NAT'L REVIEW (Oct. 1, 2018), https://www.nationalreview.com/2018/10/the-incredible-economic-opportunities-of-offshore-energy-exploration/ (stating that "natural gas and oil exploration jobs offer average salaries of $116,000 a year, without necessarily requiring a college degree"). A study examining the economic impacts of energy activity in Louisiana estimated that the average wage earned by employees in the oil and gas extraction area was 180% of the overall average. Eric N. Smith, *Louisiana – The Status of the State: A Report on the Impact of Energy Activity on the State's Economy* at 46, GREATER NEW ORLEANS, INC. (2014), http://www.noia.org/wp-content/uploads/2014/04/Future_of_Energy_FINAL-GNO-INc.pdf.

they enjoy on land. Employees live and eat rent-free during shifts, with employers providing lodging and bathing facilities, meals, and cleaning services at no cost to employees. And when the hitch is over, the employee returns home to spend an equivalent number of days off.

Employers and employees in the offshore industry have crafted these mutually beneficial wage-and-benefit policies based on a shared understanding of the governing legal framework, see *supra* § I, and the industry's practical and financial realities. By altering the background legal framework, the Ninth Circuit's decision is all but certain to significantly disrupt those relationships. Overnight, employers in the Ninth Circuit became subject to state wage-and-hour laws designed for conventional (*e.g.*, 9-to-5) employment but ill-tailored to the OCS's unique working environment.

The disruptive effects are numerous. Offshore employers are now faced with changing not only base pay and overtime arrangements, but also a range of other employment terms, such as benefit packages. Some benefits provided to offshore workers—such as life insurance policies provided by third-party financial institutions—are tied to a worker's base pay. Thus, reducing base pay to offset the additional cost of paying for sleep time would have cascading collateral consequences, often to the employee's detriment. The decision's ripple effects stretch beyond employees of platform operators; contractors providing food service, cleaning, and other services on platforms now face uncertainty about paying their own employees.

Moreover, if applied retroactively, the Ninth Circuit's decision could inflict hundreds of millions of dollars of liability on employers who structured operations in reliance on cases like *Rodrigue* and *Continental Oil*. Such a result would give employees—already generously compensated under existing arrangements—a windfall of backpay, plus interest and penalties. Going forward, it is doubtful that employers could offer such generous compensation and benefit terms, if relationships are subject to state-law overtime and other requirements enacted without regard for the unique circumstances of OCS work. Thus, the Ninth Circuit's decision not only creates the potential for significant retroactive liability, it is disrupting employer-employee relationships, industry-wide.

Both sides would benefit from having a uniform choice-of-law regime governing the OCS. Otherwise, both employers and employees will face a different legal regime depending on whether they are operating in the Gulf of Mexico or off the Pacific Coast—and which neighboring state is closest to that location. Indeed, because individual employees may move between the Gulf of Mexico and the Pacific Coast on a short-term basis, they could be subject to multiple pay structures in a given year or month.[12] Increasing the cost of OCS operations could also

[12] For instance, Pacific Coast platform operators may hire specialist teams from the Gulf of Mexico to perform particular tasks, such as plugging and abandonment of wells, on a short-term or extended basis. Such workers could be subject to certain provisions of California employment law beginning with their first full day of work. *E.g.*, *Sullivan* v. *Oracle Corp.*, 254 P.3d 237 (Cal. 2011).

shorten the economic life of some offshore facilities, harming not only employees, but also the federal government, and ultimately taxpayers.

The federal government has a substantial "proprietary interest in the OCS." *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994) (citation omitted). OCSLA authorizes the Secretary of the Interior to offer and administer oil and gas leases on the OCS. *Aera Energy LLC* v. *Salazar*, 642 F.3d 212, 214 (D.C. Cir. 2011). Under such leases, private companies pay "an up-front bonus, annual rentals, and royalties on oil and natural gas actually produced" during the lease term. *Ibid.* (citing 43 U.S.C. §1337(a), (b)); see also 30 C.F.R. §560.202 (describing bidding systems). Offshore activity generates billions in federal revenue. Increasing the costs and potential liability of offshore production activity could deprive the federal government of significant revenue, not only lowering the government's annual royalties from existing leases, but also deterring operators from bidding on new leases and slowing development on the OCS overall.[13]

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[13] One recent study estimated that expanding oil and gas activity in the Eastern Gulf of Mexico alone could increase federal revenues from royalties, bonus bids, and rents by some $41.5 billion. See *The Economic Impacts of Allowing Access to the Eastern Gulf of Mexico for Oil and Natural Gas Exploration and Development* at 5 (2018), http://www.noia.org/wp-content/uploads/2018/04/180309-Calash-Eastern-Gulf-Development-Economic-Impacts-Report-Final.pdf.

III. The Ninth Circuit's Decision Gives States Supremacy Over Federal Law, And Invites Efforts To Frustrate Federal Policy

The Ninth Circuit's decision effectively gives state law supremacy over federal law, contrary to OCSLA's text and intent. In OCSLA, "Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit." *Shell Oil*, 488 U.S. at 27 (citations and internal quotation marks omitted). And because "the OCS [is] subject to the exclusive jurisdiction and control of the Federal Government," *ibid.*, "federal law should prevail" over state law, particularly where, as here, a federal statutory scheme does apply. *Rodrigue*, 395 U.S. at 358.

Notwithstanding the panel's attempt to downplay the issue, the Ninth Circuit's decision effectively "accord[s] state law supremacy over federal law" and "cede[s] the United States' jurisdiction over the OCS to state agencies." Pet. App. 23. In the Ninth Circuit's mistaken view, even when a comprehensive federal scheme governs claims arising on the OCS, state law will control so long as it "pertain[s] to the subject matter at hand," Pet. App. 21-27, and is not "inconsistent with" existing federal law (under the Ninth Circuit's diluted reading of "inconsistent," see Pet. App. 27-39). The Ninth Circuit's interpretation, which blesses the wholesale application of state law on the OCS, cannot be reconciled with OCSLA's text and purpose.

Beginning in the 1930s, coastal States and the federal government became locked in a dispute over

"territorial jurisdiction and ownership of the OCS." *Shell Oil*, 488 U.S. at 26-27. This Court settled that debate in 1947, holding that the federal government, and not the states, had "paramount rights in and power over" the OCS. *United States* v. *California*, 332 U.S. 19, 38-39 (1947). Three years later, this Court reaffirmed that the OCS

> is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

United States v. *Louisiana*, 339 U.S. 699, 704 (1950); see also *United States* v. *Texas*, 339 U.S. 707, 719-720 (1950). These cases established that, as a matter of constitutional structure, "paramount rights" to the OCS are "an incident to national sovereignty," meaning that the control of the OCS is "in the first instance * * * the business of the Federal Government rather than the States." *Maine*, 420 U.S. at 522.

Shortly thereafter, Congress enacted OCSLA in an effort "to resolve the 'interminable litigation' arising over the controversy of the ownership of the lands underlying the marginal sea." *Maine*, 420 U.S. at 527 (quoting H.R. Rep. No. 215 83rd Cong., 1st Sess. 2 (1953)); see also *Gulf Offshore*, 453 U.S. at 479 n.7. Perhaps "the most challenging question of legal theory" Congress faced in drafting OCSLA

was what law should apply on the OCS. Christopher, *The Outer Continental Shelf Lands Act*, 6 STAN. L. REV. at 37.[14]

Congress deliberately rejected a blanket application of either maritime law or state law to the OCS. See *Rodrigue*, 395 U.S. at 355, 358-359, 361-366. Opponents of OCSLA, led by Louisiana Senator Russell Long, had argued in favor of applying state law on the OCS, enforced by "the officials of such State." *Id.* at 358-359. But Congress rejected "the notion of supremacy of state law administered by state agencies," *Cont'l Oil*, 417 F.2d at 1036 (citing *Rodrigue*, 395 U.S. at 358), opting instead for "a unique combination of federal and state laws," Christopher, *The Outer Continental Shelf Lands Act*, 6 STAN. L. REV. at 40-41. In adopting this approach, Congress embraced "the constitutional underpinnings" of the *Texas*, *Louisiana*, and *California* cases. See *Maine*, 420 U.S. at 524-527; see also *Maryland*, 451 U.S. at 730.

OCSLA must be understood in the context of this Court's decisions resolving "the clash between national sovereignty and states' rights" on the OCS. *Cont'l Oil*, 417 F.2d at 1036. Indeed, this Court has consistently and repeatedly interpreted OCSLA in light of this historical background. See, *e.g.*, *Shell Oil*, 488 U.S. at 26-27; *Gulf Offshore*, 453 U.S. at 479 n.7; accord *Leo Sheep Co.* v. *United States*, 440 U.S.

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[14] The choice-of-law issue had "political ramifications" because "the law to be applied had a bearing on the question whether the coastal states were to share in the revenues of the outer Continental Shelf." Christopher, *The Outer Continental Shelf Lands Act*, 6 STAN. L. REV. at 37, 40-41.

668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." (citation omitted)). Congress's choice in OCSLA "to retain exclusive federal control of the administration of the [OCS]," *Gulf Offshore*, 453 U.S. at 479 n.7, "affirm[s] the Federal Government's authority and control over the [OCS]," *Pac. Operators*, 565 U.S. at 212.[15] While Congress recognized that offshore workers might in some circumstances have "tie[s]" to adjacent States, *Rodrigue*, 395 U.S. at 355, it struck a balance that "manifested itself primarily in the incorporation of the law of adjacent States to fill gaps in federal law." *Gulf Offshore*, 453 U.S. at 479 n.7 (citations omitted).

Despite the fact that Congress expressly rejected "the notion of supremacy of state law administered by state agencies" on the OCS, *Cont'l Oil*, 417 F.2d at 1036, the Ninth Circuit's decision allows state law, enforced by state officials, to control on the OCS. The Ninth Circuit's analysis "accords initially a superiority to adjacent state law" because "the question of federal law comes into play only after this process excludes state law." *Id.* at 1035-1036; but cf. *Rodrigue*, 395 U.S. at 359 (state law applies

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[15] The same year Congress enacted OCSLA, it passed the Submerged Lands Act, 43 U.S.C. §§1301-1315, which "confirm[ed] the Federal Government's interest in the area seaward of the 3-mile limit." *Maryland*, 451 U.S. at 730; see also *Maine*, 420 U.S. at 524.

under OCSLA only if federal law does not "first apply"). This interpretation effectively reads the word "applicable" out of the statute, "put[ting] almost 100% Emphasis on the not inconsistent with federal laws element of [§1333(a)(2)(A)]," *Cont'l Oil*, 417 F.2d at 1035 (internal quotation marks and alterations omitted), an approach this Court has long disfavored. See Pet. 27-29; but cf. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 632 (2018) ("[T]he Court is obliged to give effect, if possible, to every word Congress used." (citation and internal quotation marks omitted)).

The practical consequences are real. The Ninth Circuit's decision allows California law to control over a federal regulation explicitly providing that employees residing on a worksite need not be paid for time spent sleeping or otherwise off duty. See 29 C.F.R. §785.23. In effectively overruling federal law, the panel invites workers (and creative plaintiff's lawyers) to retroactively claim a host of extra-contractual rights based in state employment or other laws. And if allowed to stand, the decision will trigger new waves of litigation—and the threat of ever-mounting retroactive liability—every time a state changes its interpretation of its wage, hour, and other employment laws.

The federal-state conflict is stark, where (as here) a federal scheme allows excluding non-working hours from overtime, see 29 C.F.R. §785.23, but state law compels the opposite approach. The Ninth Circuit's decision departs from cases holding that California state wage-and-hour laws could not apply in other federal enclaves, because they conflict with

the FLSA. *E.g.*, *Mersnick* v. *USProtect Corp.*, No. 06-cv-3993, 2006 WL 3734396, at *7-8 (N.D. Cal. Dec. 18, 2006); cf. *Rodrigue*, 395 U.S. at 355 (fixtures on OCS treated as "federal enclaves in an upland State").

In practice, some states have—and likely will always have—different policy preferences than the federal government regarding OCS activity. The panel decision opens the door to strategic behavior, inviting states to promulgate facially neutral but effectively targeted laws that increase the difficulty and cost of OCS operations. The concern is not theoretical. *E.g.*, Jeff Daniels, *California Gov. Jerry Brown Moves to Block Trump on Offshore Drilling: 'Not Here, Not Now,'"* CNBC (Sept. 8, 2018), https://tinyurl.com/y9lrv8ml (discussing new California legislation intended "to thwart" federal government's "efforts to expand offshore oil drilling along the California coast"); Andre Stepankowsky, *West Coast States Push Back on Drilling Proposal*, THE DAILY NEWS (Jan. 5, 2018), https://tinyurl.com/y7e8flxq (quoting joint statement by Governors of California, Washington, and Oregon opposing federal proposal to expand OCS oil and gas operations).

In short, the Ninth Circuit's decision transforms a statute "intended to provide for the orderly development of offshore resources," *Shell Oil*, 488 U.S. at 27 (citation and internal quotation marks omitted), into a regime of jurisdictional chaos, inviting States to assert ever-increasing authority over commercial activities in an area Congress reserved for primary

federal jurisdiction and control. This Court's review is urgently warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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